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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-720

LEE WAY MOTOR FREIGHT, INC.,
Petitioner,

vs.

PATRICK RESENDIS, TONY ESCOBEDO AND ELIAS GONZALEZ,
Respondents,

and

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

ERNEST HERRERA, TRINE URIBE AND MARIO MELCHOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners Lee Way Motor Freight, Inc. and Yellow Freight System, Inc. present their petition for a rehearing of the Court's order dated May 14, 1976, denying the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully show:

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GROUNDS FOR REHEARING

Petitioners respectfully submit that rehearing should be granted and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit based on intervening circumstances of substantial and controlling effect. The intervening event on which petitioners rely is the granting of three petitions for writ of certiorari in *Rodriguez* v. *East Texas Motor Freight System, Inc.*,[1] a companion case with the two cases for which petitioners seek rehearing by the instant motion. Petitioners maintain that if there is to be uniformity in the application of the principles which this Court will announce in the *Rodriguez* case the judgments below in the instant cases cannot stand. *Cf. United States* v. *Ohio Power Company*, 353 U.S. 98 (1957).

The opinions of the Fifth Circuit in the *Lee Way*[2] and *Yellow Freight*[3] cases are wholly dependent on the decision in the *Rodriguez* case. As a practical matter there are no separate opinions in *Lee Way* and *Yellow Freight* providing direction to the District Court on re-

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1. On May 24, 1976, this court granted the petition for writ of certiorari of East Texas Motor Freight System, Inc., the Southern Conference of Teamsters and Teamster Local Union 657, each petition for writ arising out of the decision of the Fifth Circuit Court of Appeals in Rodriguez v. East Texas Motor Freight System, Inc., No. 73-2801, decided November 25, 1974, referred to hereafter as the "Rodriguez" case.

2. The decision of the Fifth Circuit Court of Appeals in Resendis v. Lee Way Motor Freight, Inc., No. 73-2322, decided November 25, 1974 will be referred to hereafter as the "Lee Way" case.

3. The decision of the Fifth Circuit Court of Appeals in Herrera v. Yellow Freight System, Inc., No. 73-2254, decided November 25, 1974 will be referred to hereafter as the "Yellow Freight" case.

mand because the rationale and remedial orders of the Fifth Circuit are contained in *Rodriguez*, a case pending before this Court.

It is clear from the three opinions of the Fifth Circuit Court of Appeals, that the Court considered *Rodriguez*, *Lee Way*, and *Yellow Freight* to be companion cases. All three cases were tried *seriatim* in the United States District Court for the Western District of Texas before the Honorable John H. Wood, Jr., District Judge. The cases were tried within a seven-day period in January, 1973 (A1, 16, 27).[4] The judgments of the District Court in each case were entered on March 22, 1973. (A9, 22, 39). Each case was effectively tried together on the same legal and factual issues, the only difference being that the *Rodriguez* case had class allegations in the complaint. All three cases were argued *seriatim* in the Fifth Circuit Court of Appeals on the same day and opinions issued on the same day, November 25, 1974. The cases have been cited as the "Rodriguez Trilogy." *Sabala* v. *Western Gillette*, 516 F.2d 1251 (CA 5, 1975).

With the exception of the class action issue, the allegations, legal issues, defenses, evidence and remedies directed by the Court of Appeals coincide. Each case involved the claim of Hispanic employees of a motor freight carrier working as city drivers at terminals where no over-the-road drivers were employed. In each case, the city drivers claimed that the practices of the employer and union defendants violated Title

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4. References to proceedings below will be to the appendix in moving parties' Petition for Writ of Certiorari No. 75-720.

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VII by unlawfully locking them into the lower paying city driver classification and inhibiting their transfer to the more lucrative positions as over-the-road drivers. The allegations and proof in each case were identical. Each case was tried upon an identical stipulation of the parties that the plaintiffs were not discriminated against in their initial employment, and the sole claim of discrimination was based upon the "lock-in" effects of the same collective bargaining agreements and the impact of the employer established "no transfer" policy. Finally, in each case the plaintiff sought to establish a prima facie case of discrimination solely through the use of undifferentiated statistics showing an imbalance of Hispanic employees in the "city" and "over-the-road" classifications.

In each case, the District Court found no discrimination, and in each case the Fifth Circuit Court of Appeals reversed and remanded for further proceedings in the District Court. In each case the Fifth Circuit directed the District Court to remedy the effects of past discrimination, proven by statistics, by allowing each plaintiff to transfer to the over-the-road classification with carry-over seniority and back pay based on the Fifth Circuit's "qualification date" formula, notwithstanding the fact that this formulation was in conflict with the holding of the Sixth Circuit Court of Appeals in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974). (A80-82). In each case the Fifth Circuit remanded to the District Court for resolution of the question of apportionment of back pay among the employer and union defendants. (A83).

The opinion of the Fifth Circuit Court of Appeals in *Rodriguez* occupies 47 pages of petitioner's appendix

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while the *Lee Way* and *Yellow Freight* opinions are respectively 5 pages and 4 pages in length. As a practical matter, the Fifth Circuit issued no opinion in the *Lee Way* and *Yellow Freight* cases, choosing instead to rely on the rationale and direction of the *Rodriguez* opinion to support its judgment. It is clear that the Fifth Circuit considered the *Lee Way* and *Yellow Freight* cases to be companions of the *Rodriguez* case.

In the *Lee Way* case for example, the Fifth Circuit stated (A11-12):

> Like its companion Title VII cases, Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, and Herrera v. Yellow Freight System, Inc., 5 Cir. 1974, 505 F.2d 66, this appeal involves claims of discrimination and the exclusion of minority persons from the sought-after road driving jobs in the trucking industry.
>
> * * *
>
> *We reversed the lower court's judgment with regard to these plaintiffs, and remand for consideration of the appropriate remedy in accordance with our opinion in Rodriguez.* (Emphasis added)

The Fifth Circuit set forth neither its *ratio decidendi* nor a discussion of the relief directed below beyond the general reference to the *Rodriguez* opinion.

In the *Yellow Freight* case, the Fifth Circuit stated (A24-26):

> In almost every respect this suit is a carbon copy of Rodriguez, except that Rodriguez was a class action while this case is brought only on behalf of individual plaintiffs. The plaintiffs here work as city drivers in Yellow Freight's San An-

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tonio terminal. Like East Texas Motor Freight, Yellow Freight domiciles no road drivers in San Antonio. Like East Texas Motor Freight, Yellow Freight's history of road-driver hiring is heavily tainted by discriminatory exclusion of minority drivers. And like East Texas Motor Freight, Yellow Freight, and the unions have hindered the transfer of city drivers to the road-driver jobs by a no-transfer policy and the maintenance of separate seniority rosters. This case was brought before the same District Judge that heard Rodriguez a few days later. Similar to its findings in Rodriguez, the court found that none of the plaintiffs 'could satisfy all the qualifications for a road-driver position according to the company manual due to age or weight or driving record.' The court concluded that '[t]he defendants did not discriminate against the plaintiffs or any other employee or union member on the basis of race or otherwise'.

The defendants here advanced many of the same arguments in support of the District Court's conclusion that the defendants advanced in Rodriguez, and again we reject them.

* * *

We reverse and remand the District Court for consideration of the remedy question in light of Rodriguez. (Emphasis added)

The opinion of the Fifth Circuit Court of Appeals contains no independent discussion of the reasons for reversing the District Court and provides no independent guidance to the District Court on remand; rather, it refers the lower court to its decision in

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Rodriguez. The District Court will be unable to obey the direction of the Fifth Circuit on remand in the *Yellow Freight* and *Lee Way* cases because the underpinnings of those decisions depend entirely upon the opinion in *Rodriguez* which is now pending on certiorari.

The Southern Conference of Teamsters and Teamsters Local Union 657, defendants in all three cases along with the truck lines, each filed a single Petition for Certiorari in all three cases, raising identical issues. The Court granted the Petition of the Southern Conference and Local 657 in *Rodriguez* but denied the identical petition in *Lee Way* and *Yellow Freight*. It is respectfully submitted that it would be grossly unfair to petitioners to deny them this Court's review of the issues identical to those which it has agreed to consider in *Rodriguez*.

This Court has consistently vacated orders denying certiorari when subsequent events reveal that grounds for granting the writ exist. In *United States* v. *Ohio Power Company*, 353 U.S. 98 (1957), this Court granted rehearing *sua sponte* six months after it had denied a petition for writ of certiorari when it accepted companion cases raising the same issue. The Court, in a per curiam opinion, stated:

> On June 11, 1956 we unanimously vacated *sua sponte* our order . . . denying the timely petition for rehearing in this case . . . so that this case might be disposed of consistently with the companion cases of United States v. Allen Bradley Company, 352 U.S. 306 and National Lead Company v. Commissioner, 352 U.S. 313 in which we had granted certiorari the same day. . . . If there is to be uniformity in the application

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> of the principles announced in those two companion cases, the judgment below in the instant case cannot stand. Accordingly, we now grant the petition for rehearing, vacate the order denying certiorari, grant the petition for certiorari, and reverse the judgment of the court of claims on the authority of United States v. Allen Bradley. . . .

353 U.S. at 98-9.

Similarly, in *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965), the Court held that rehearing was properly granted because of "intervening circumstances of substantial. . . effect" because a conflict in the circuits had arisen subsequent to the denial of the petition for writ of certiorari.

In the event the Court should deny this motion for rehearing, Petitioners request the Court to recall and stay the mandate of the Fifth Circuit Court of Appeals until final resolution of *Rodriguez* so that the District Court may conform its disposition of *Lee Way* and *Yellow Freight* to the decision of this Court in *Rodriguez*. See *Rizzo* v. *Goode*, 421 U.S. 902 (1975)

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issued to the United States Court of Appeals for the Fifth Circuit, or, in the alternative, that this court stay the

mandate until the issues in the *Rodriguez* case are resolved.

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CERTIFICATE OF COUINSEL

I, Paul Scott Kelly, Jr., counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

PAUL SCOTT KELLY, JR.
Counsel for Petitioners